No. 06-9130

In the Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether Bureau of Prisons officials constitute "law enforcement officer[s]" for purposes of the detention-of-property exception to the Federal Tort Claims Act, 28 U.S.C. 2680(c).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 57-62) is not published in the Federal Reporter, but is reprinted at 204 Fed. Appx. 778. The order of the district court (J.A. 41-56) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The petition was filed on January 25, 2007, and granted on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, is reprinted in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the United States' sovereign immunity for suits seeking damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of employees of the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA, however, excepts thirteen categories of governmental activity from that waiver of sovereign immunity. 28 U.S.C. 2680. For example, the FTCA contains exceptions for claims involving the performance of a discretionary function, 28 U.S.C. 2680(a); claims involving the mishandling of mail, 28 U.S.C. 2680(b); and claims arising out of intentional torts, except for claims involving the acts or omissions of investigative or law enforcement officers, 28 U.S.C. 2680(h).

This case concerns the FTCA exception that preserves the federal government's immunity for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). That exception itself contains an exception, which waives the government's immunity for "any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any

officer of customs or excise or any other law enforcement officer," if, among other requirements, "the property was seized for the purpose of forfeiture under any provision of Federal law providing for the [civil] forfeiture of property" and "the interest of the claimant was not forfeited." *Ibid.*

2. Petitioner is a federal prisoner serving a sentence of 20 years to life for committing first-degree murder in the District of Columbia. See *Ali* v. *United States*, 581 A.2d 368, 370 (D.C. 1990), cert. denied, 502 U.S. 893 (1991). In 2003, the Federal Bureau of Prisons (BOP) transferred petitioner from the United States Penitentiary in Atlanta to the United States Penitentiary in Inez, Kentucky.[1] Petitioner alleges that, during the transfer, BOP officials lost several items of his personal property, including a copy of the Koran, a prayer mat, three books of 37-cent stamps, and two packs of tube socks, valued at a total of $177. Petitioner further alleges that, when he picked up his property and attempted to inform BOP officials that some of his property was missing, they told him that he should file "a Federal tor[t] claim." J.A. 14-18, 24-27, 42-45.

Petitioner filed a timely administrative tort claim with the Southeast Regional Office of the BOP. J.A. 30-35; see 28 C.F.R. 543.30-543.32 (setting out procedures for filing an administrative claim with the BOP for "money damages for personal injury or death and/or damage to or loss of property"). The BOP denied the claim. J.A. 38-40. It concluded that petitioner "did not inform staff of any discrepancies or missing personal property" and "failed to provide documentation [that]

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[1] Petitioner has since been transferred to the United States Penitentiary in Terre Haute, Indiana, where he is currently incarcerated.

[he] had any of the alleged missing items in [his] possession prior to [his] transfer." J.A. 39.

3. Petitioner then filed suit in the United States District Court for the Northern District of Georgia against the United States, the BOP, and three BOP officials. Petitioner claimed, *inter alia*, that the United States was liable under the FTCA for the value of his lost property. J.A. 6-23, 47-48 & n.4.[2] The government moved to dismiss the FTCA claim for lack of subject matter jurisdiction, on the ground that the United States was immune from suit under the detention-of-property exception in 28 U.S.C. 2680(c).

The district court granted the government's motion to dismiss, holding that the detention-of-property exception in 28 U.S.C. 2680(c) was applicable. J.A. 41-56. The district court relied on the Eleventh Circuit's unpublished opinion in *Agunbiade* v. *Federal Bureau of Prisons*, 52 Fed. Appx. 492 (2002) (Table), which held that BOP officials constituted "law enforcement officer[s]" for purposes of the detention-of-property exception.

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[2] Petitioner also pursued claims against defendants under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, and claims against the individual defendants under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his First, Fourth, and Fifth Amendment rights. See J.A. 6-23, 47-48 & n.4, 58. The district court dismissed those claims without prejudice for failure to exhaust administrative remedies under the applicable requirements of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a). J.A. 51-55. The court of appeals vacated the dismissal of those claims, on the ground that it was unclear whether prison officials led petitioner to believe that his administrative tort claim would exhaust his non-FTCA claims. J.A. 60-62. On remand, the district court administratively closed the action pending this Court's decision. See 6/5/07 Order 2.

J.A. 50. The district court concluded that, while *Agunbiade* (as an unpublished opinion) was not binding, it constituted "persuasive authority." *Ibid.*

4. The court of appeals affirmed in relevant part. J.A. 57-62. At the outset, the court of appeals noted that this Court "has interpreted § 2680(c) broadly to cover not only damages arising from the detention of goods or merchandise, but also situations in which damages result from their negligent storage or handling." J.A. 59 (citing *Kosak* v. *United States*, 465 U.S. 848, 854-859 (1984)). The court then noted that it had previously addressed the meaning of the phrase "any other law enforcement officer" in *Schlaebitz* v. *United States Department of Justice*, 924 F.2d 193 (11th Cir. 1991) (per curiam). J.A. 59.

In *Schlaebitz*, an individual had sued the government after the U.S. Marshals Service confiscated his property when it arrested him for a parole violation, then released the property to a third party. 924 F.2d at 193-194. Citing decisions from other circuits, the Eleventh Circuit rejected the argument that the phrase "any other law enforcement officer[s]" referred only to "officials assisting * * * customs or tax collection." *Id.* at 194. The court instead held that Section 2680(c) "may include officers in other agencies performing their proper duties." *Ibid.* The court noted that "this interpretation comports well with * * * the purpose of the statute." *Id.* at 194-195.

Applying the reasoning of *Schlaebitz* in the BOP context, the court of appeals concluded in this case that "the district court did not err in finding that the officers who handled Ali's property fall within the exception found in 28 U.S.C. § 2680(c)." J.A. 60.

SUMMARY OF ARGUMENT

A. This case presents a straightforward question of statutory interpretation with a straightforward answer. As is relevant here, 28 U.S.C. 2680(c) preserves the federal government's immunity for "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The phrase "any other law enforcement officer" reaches "any * * * law enforcement officer" other than "an[] officer of customs or excise," and Section 2680(c) therefore exempts claims concerning the detention of property by all law enforcement officers. The "exception to the exception" that Congress subsequently added for claims concerning seizures for the purpose of civil forfeiture confirms that reading of Section 2680(c)'s plain text. Because Bureau of Prisons officials constitute "law enforcement officer[s]" under any conceivable understanding of that phrase, the lower courts correctly held that the government was immune from petitioner's suit challenging the alleged loss of his property.

B. Petitioner contends that, notwithstanding the plain language of Section 2680(c), the phrase "any other law enforcement officer" should be limited to those law enforcement officers who are "acting in a customs or tax capacity." The various canons of statutory construction that petitioner invokes, however, cannot support that profoundly atextual reading. At bottom, petitioner asserts that the Court should engraft his proposed limitation on the phrase "any other law enforcement officer" simply because other portions of the statute focus on customs and tax enforcement. This Court has long forsworn such an impressionistic approach to statutory

interpretation. In fact, petitioner's construction of Section 2680(c) not only cannot be squared with the scope of the exception to the exception, but would seemingly render the phrase "any other law enforcement officer" entirely, or almost entirely, superfluous, because petitioner fails to identify a single valid example of a law enforcement officer other than a customs or excise officer who could be said to be "acting in a customs or tax capacity."

C. Petitioner contends that Section 2680(c) should be given his more limited reading because the legislative history contains no affirmative indications that Congress intended to reach all law enforcement officers. Because the plain language of Section 2680(c) compels a broader construction, however, it is incumbent on *petitioner* to show that the legislative history cuts in the other direction. In fact, to the extent the legislative history sheds any light on Congress's intent in using the phrase "any other law enforcement officer," it actually supports the broader construction. While the legislative history is largely silent about the meaning of Section 2680(c), the official who apparently drafted the relevant language seemingly expressed the view that the statute reached all law enforcement officers, without regard to whether they were "acting in a customs or tax capacity." The legislative history certainly does not contain sufficient evidence about Congress's intent to trump the plain meaning of the text.

D. Finally, petitioner suggests that his reading of Section 2680(c) is consistent with the purposes behind the FTCA's exceptions. A reading of Section 2680(c) that reaches all law enforcement officers, however, not only is more consistent with the statute's plain language, but is equally consistent with Congress's underlying

policy objectives: most notably, its desire to protect important government activities from disruption by the threat of damages suits and to avoid exposing the government to liability for fraudulent claims. Should Congress wish to subject the government to liability for claims concerning the detention of property by law enforcement officers who are not "acting in a customs or tax capacity," it can always amend Section 2680(c) to do so. Such a limitation, however, cannot be discovered in the text of the statute as it is currently written.

ARGUMENT

BUREAU OF PRISONS OFFICIALS CONSTITUTE "LAW ENFORCEMENT OFFICERS" FOR PURPOSES OF THE DETENTION-OF-PROPERTY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

In the Federal Tort Claims Act, which makes the United States liable for torts committed by federal employees under circumstances in which a private person would be liable, Congress included an exception for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). Petitioner asserts that the phrase "any other law enforcement officer" is limited to law enforcement officers who are "acting in a customs or tax capacity." The plain language of Section 2680(c), however, belies that assertion, and petitioner's contention (Br. 17) that "Congress intended the phrase * * * to apply more narrowly than might appear from reading the phrase in isolation" lacks merit.

A. The Plain Language Of Section 2680(c) Makes Clear That Bureau Of Prisons Officials Constitute "Law Enforcement Officers" For Purposes Of The Detention-Of-Property Exception

1. As this Court has repeatedly noted, "in any case of statutory construction, our analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). That basic principle of statutory interpretation is equally applicable in construing the FTCA. The Court has explained that, where the "straightforward language" of an FTCA exception applies, judicially crafted limitations on the exception—whether rooted in policy concerns or intimations in the legislative history—have no place. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 701 (2004).

Section 2680(c) contains precisely such "straightforward language," and that language controls this case. As is relevant here, Section 2680(c) preserves the government's immunity for any claim concerning the "detention" of any property by "any officer of customs or excise or any other law enforcement officer." The phrase "any other law enforcement officer" thus reaches "any * * * law enforcement officer" *other than* an "officer of customs or excise." The language of Section 2680(c) "leaves no room to speculate about congressional intent," because, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*,

520 U.S. 1, 5, 9 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Accordingly, Section 2680(c) should be read to exempt claims concerning the detention of property by all law enforcement officers.[3]

"[W]hen the statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms," unless "the disposition required by the text is * * * absurd." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citation omitted). Petitioner does not contend that construing Section 2680(c) to reach claims concerning the detention of property by all law enforcement officers would produce absurd results. Nor could he plausibly do so, because, far from being absurd, it is perfectly reasonable to immunize the federal government against such claims. See pp. 37-45, *infra*. Under first principles of statutory interpretation, therefore, Section 2680(c) should be read to mean what it says: *i.e.*, that claims concerning the detention of property by *any* law enforcement officer are exempt from the FTCA's waiver of sovereign immunity.

2. That reading of the detention-of-property exception in Section 2680(c) is confirmed by the "exception to the exception," which Congress added as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 3(a)(3), 114 Stat. 211, in order to waive the government's immunity for certain seizures of

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[3] Of course, the exemption in Section 2680(c) would only reach claims that are covered in the first place by the FTCA's waiver of sovereign immunity: *i.e.*, claims concerning the "act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1).

property for the purpose of civil forfeiture.[4] The exception to the exception is applicable to "any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer," if, among other requirements, "the property was seized for the purpose of forfeiture under *any* provision of Federal law providing for the forfeiture of property" (except for criminal forfeiture). 28 U.S.C. 2680(c) (emphasis added).

In adding the exception to the exception, Congress clearly operated on the understanding that the phrase "any other law enforcement officer" in the original exception reached all other law enforcement officers.[5] If, as petitioner contends, Congress had believed that the

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[4] In CAFRA, Congress also extended the exception, which originally reached only the detention of "any goods or merchandise," 28 U.S.C. 2680(c) (1994), to reach the detention of "any goods, merchandise, or other property." § 3(a)(1), 114 Stat. 211. The exact significance of that amendment is not at issue here, because petitioner seemingly concedes (Br. 46-47 n.41) that the allegedly lost property in this case would constitute "goods or merchandise" as those terms were used in the original Section 2680(c). At a minimum, however, the amendment reflects Congress's desire to ensure that the exception in Section 2680(c) sweeps broadly.

[5] At the time Congress enacted CAFRA, the clear majority of the circuits to have addressed the issue had adopted that interpretation. See *Halverson* v. *United States*, 972 F.2d 654, 655-656 (5th Cir. 1992) (per curiam), cert. denied, 507 U.S. 925 (1993); *Schlaebitz*, 924 F.2d at 194-195; *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1524-1525 (Fed. Cir. 1988); *United States* v. *2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1491 (10th Cir.), cert. denied, 469 U.S. 825 (1984); *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979); but see *Kurinsky* v. *United States*, 33 F.3d 594, 598 (6th Cir. 1994) (adopting contrary interpretation), cert. denied, 514 U.S. 1082 (1995); *Bazuaye* v. *United States*, 83 F.3d 482, 486 (D.C. Cir. 1996) (same).

original exception reached only "officer[s] of customs or excise" (or other law enforcement officers "acting in a customs or tax capacity"), it would not have written such a broad exception to the exception, applicable whenever property was seized for the purpose of forfeiture under "any" civil forfeiture provision. Customs and internal revenue officers do not pursue forfeitures under the vast majority of civil forfeiture statutes, which involve contexts far removed from the performance of their respective duties. See, *e.g.*, 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* chs. 4-5 (June 2007) (discussing various civil forfeiture statutes). If Congress had shared petitioner's view of the exception, it presumably would have limited the exception to the exception to property seized pursuant to the forfeiture provisions relevant to customs and internal revenue functions (*i.e.*, the provisions in Titles 19 and 26 of the United States Code). See, *e.g.*, 19 U.S.C. 1595a (customs forfeiture); 26 U.S.C. 7301 (tax forfeiture). Congress did not so provide, and the logical conclusion is that Congress understood the phrase "any other law enforcement officer" to reach all other law enforcement officers.

The legislative history of CAFRA confirms that understanding. In the sole committee report on CAFRA, the House Judiciary Committee characterized the detention-of-property exception as "exempt[ing] [the government] from liability * * * for damage to property while detained by law enforcement officers." H.R. Rep. No. 192, 106th Cong., 1st Sess. 18 (1999). The Committee explained that the exception to the exception was intended to enable individuals to "make themselves whole after wrongful government seizures," *id.* at 11, and cited a prior example involving the detention of property by the Drug Enforcement Administration, *id.*

at 8-9. Moreover, Representative Hyde, the Judiciary Committee chairman, noted during the floor debates that, "[c]urrently, the Federal Government is exempt from liability for damage caused during the handling or storage of property being detained by law enforcement officers," and that the proposed amendment to Section 2680(c) would "allow[] property owners to sue the Federal Government for compensation for damage to their property when they prevail in civil forfeiture actions." 146 Cong. Rec. 5228 (2000).

Petitioner asserts (Br. 46, 47) that CAFRA's exception to the exception is "irrelevant to the case" because *his* property was not detained for the purpose of civil forfeiture. Petitioner thus contends (Br. 47) that, at least with regard to his claim, the detention-of-property exception should be construed "as * * * if CAFRA had never been enacted." That contention, however, ignores the settled principles of statutory interpretation that statutory language must be read with a view to its place in the overall statutory scheme, see, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991); that statutory terms cannot have different meanings in different scenarios, see, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005); and that a subsequently enacted statute can shed light on the meaning of a previously enacted one, see, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000); *United States* v. *Estate of Romani*, 523 U.S. 517, 530-531 (1998); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Those principles pertain here, regardless whether the subsequently enacted statute directly

applies to petitioner's claim—and CAFRA confirms that the FTCA's detention-of-property exception was intended to reach *all* law enforcement officers, not merely those "acting in a customs or tax capacity."

Petitioner also contends that CAFRA's exception to the exception is irrelevant because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Br. 48 (quoting *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 165 n.27 (1980)). That principle, however, is inapplicable where, as here, Congress's subsequent understanding of a previously enacted statute is actually embodied in a statute, not just in the legislative history of a subsequent enactment. See, *e.g.*, *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 843 (1988) (Kennedy, J., dissenting). All of the cases on which petitioner relies involve subsequent understandings that were embodied only in legislative history.[6] Here, CAFRA itself confirms that the FTCA's detention-of-property exception was intended to reach *any* law enforcement officer—as the plain language of that exception itself makes clear.

3. If Section 2680(c) is construed, consistent with its plain language, to encompass claims concerning the detention of property by any law enforcement officer, it is indisputable, as petitioner seemingly concedes (Br. 20 n.14), that the Bureau of Prisons officials who were responsible for the alleged detention of his property con-

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[6] See *Jefferson County Pharm. Ass'n*, 460 U.S. at 165 n.27; *GTE Sylvania*, 447 U.S. at 118 n.13; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *United Air Lines, Inc.* v. *McCann*, 434 U.S. 192, 200 & n.7 (1977); *United States* v. *Price*, 361 U.S. 304, 313 (1960).

stitute "law enforcement officer[s]." Although Section 2680(c) does not define the phrase "law enforcement officer," BOP officials "enforce[]" the "law" under any conceivable understanding of that phrase; in addition to administering the federal prison system, BOP officials have broad authority to make arrests. See 18 U.S.C. 3050. Moreover, BOP officials unambiguously qualify as "law enforcement officers" under a variety of statutes that do expressly define that phrase (or similar ones)—most notably, 28 U.S.C. 2680(h), the provision of the FTCA that waives the government's immunity for claims arising out of intentional torts that involve the acts or omissions of "investigative or law enforcement officers." See also 5 U.S.C. 8331(20) (civil service retirement benefits); 18 U.S.C. 3592(c)(14)(D) (aggravating factor for purposes of federal death penalty); 42 U.S.C. 3796b(6) (death benefits); see generally *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (per curiam) (citing other statutes). Because Section 2680(c) encompasses claims concerning the detention of property by all law enforcement officers, and because BOP officials plainly constitute "law enforcement officers" under any definition of that phrase, the lower courts correctly held that the government is immune from suit under the detention-of-property exception.[7]

[7] Although petitioner does not contend here (and did not contend below) that his claim does not arise in respect of the "detention" of property, petitioner nevertheless suggests (Br. 10 n.9) that the meaning of the term "detention" "remains open to debate." At a minimum, however, it is clear that the term "detention" encompasses short-term custody of property of the type at issue here. See, *e.g.*, *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390-391 (5th Cir. 2003) (per curiam) (holding that BOP officials "detained" prisoner's property when they inspected and then shipped it during an inter-prison transfer). The term "detention" is also properly construed to encompass longer-

B. Nothing In The Text Of Section 2680(c) Supports The Conclusion That The Phrase "Any Other Law Enforcement Officer" Refers Only To Law Enforcement Officers Who Are "Acting In A Customs Or Tax Capacity"

1. Petitioner contends that, notwithstanding the plain language of Section 2680(c), the phrase "any other law enforcement officer" should be limited to those law enforcement officers who are "acting in a customs or tax capacity." The simplest response to that contention is that, if Congress had intended to impose such a narrow limitation, it would have written a different statute. Indeed, in one of the federal officer removal statutes in effect at the time of the FTCA's enactment, Congress had provided for removal not only by any internal revenue officer, but also by "any person acting under or by authority of any such officer on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. Congress, however, chose not to employ similar language in Section 2680(c), but instead used the expansive phrase "any other law enforcement officer." This Court has repeatedly declined to give limiting constructions to broad statutory language where "Congress did not add any language limiting the [statute's] breadth." *Gonzales*, 520 U.S. at 5 (refusing to construe "any * * * term of imprisonment" to mean

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term *seizures* of property. See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) (*Holtzoff Report*) (explaining that the detention-of-property exception "has specific reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as *seizures* by law enforcement officials, internal revenue officers, and the like") (emphasis added). Were it otherwise, the subsequently added exception to the exception in Section 2680(c) for claims involving property that "was seized for the purpose of forfeiture," see pp. 10-14, *supra*, would make little sense.

any *federal* term of imprisonment); see *Maine* v. *Thiboutot*, 448 U.S. 1, 4, 6 (1980) (refusing to read the term "laws" in 42 U.S.C. 1983 to be limited to "civil rights or equal protection laws," on the ground that "Congress attached no modifiers to the phrase"). Congress's failure to use limiting language here strongly suggests that Congress did not intend to adopt the limitation that petitioner proposes.

2. Petitioner contends (Br. 12-18) that various canons of statutory construction—*viz.*, the canon of *ejusdem generis*, the canon of *noscitur a sociis*, and the rule against superfluities—support his proposed reading of Section 2680(c). Those canons, however, are merely "aid[s] to the ascertainment of the true meaning of the statute," *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934), not devices to cloud the meaning of clear statutory text. In any event, none of those canons supports petitioner's strained reading.

a. Petitioner first relies (Br. 13-15) on the canon of *ejusdem generis* (or "of the same kind"), which stands for the proposition that, "when a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated." *James* v. *United States*, 127 S. Ct. 1586, 1592 (2007). As a preliminary matter, that canon is inapplicable where, as here, the general (or residual) phrase at issue has a clear meaning. See, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 127-129 (1991); *United States* v. *Turkette*, 452 U.S. 576, 581 (1981); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980); see also *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 138 n.2 (2001) (Souter, J., dissenting) (citing additional cases). That is particularly true when the general

phrase at issue is introduced with the expansive term "any." See pp. 9-10, *supra*.

At a minimum, where the general phrase can be given a reasonable meaning without applying a limiting construction, the force of the *ejusdem generis* canon is accordingly weaker. To take petitioner's example (Br. 13), if a statute were to refer to "tacks, staples, screws, nails, rivets, and other things," it would be nonsensical for the phrase "other things" to be read to refer to any other object whatsoever (as opposed to, say, any other fastener, or any other metal fastener)—and resort to the *ejusdem generis* canon is therefore obviously necessary. If the residual phrase at issue were instead "any other hardware," however, that phrase could not be limited to hardware used for fastening. But that is the burden of petitioner's argument. The residual phrase in the statute at issue here is not some phrase in obvious need of limitation, such as "other persons" (or even "other government officials"), but rather the more limited phrase "any other law enforcement officer." The *ejusdem generis* canon cannot be used to limit that phrase still further—*i.e.*, to a subset of law enforcement officers—without reading the word "any" out of the statute.

The *ejusdem generis* canon is inapplicable here for the further reason that, as petitioner seemingly acknowledges (Br. 13), it is triggered only when a general phrase follows a *list* of specific phrases. See, *e.g.*, *James*, 127 S. Ct. at 1592; *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part); *Holder* v. *Hall*, 512 U.S. 874, 918 (1994) (Thomas, J., concurring in the judgment); see also 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47:17, at 273-274 (6th ed. 2000) (Singer). In this case, the only specific phrase that is parallel to

the residual phrase "any other law enforcement officer" is the single phrase "any officer of customs or excise."[8] This Court, applying the related canon of *noscitur a sociis*, has previously rejected the argument that "pairing a broad statutory term with a narrow one shrinks the broad one," on the ground that "giving one example does not convert express inclusion into restrictive equation, and *noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren & Co.* v. *Maine Bd. of Envt'l Prot.*, 126 S. Ct. 1843, 1849 (2006); cf. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 587 (1995) (Thomas, J., dissenting) (explaining that "[t]o read one word in a long list as controlling the meaning of all the other words would defy common

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[8] Petitioner seemingly construes the phrase "any officer of customs or excise" to reach all customs and *tax* officers. See, *e.g.*, Br. 10, 12, 13, 17, 18. The exact meaning of that phrase, however, is unclear. While the concept of a "customs officer" is a familiar one (and the phrase is used throughout the United States Code, see, *e.g.*, 19 U.S.C. 1401(i), 1589a), the phrase "excise officer" (or "officer of excise") appears nowhere else. In drafting the language that would become Section 2680(c), Special Assistant to the Attorney General Alexander Holtzoff appears to have borrowed the phrase "any officer of customs or excise" from a British bill that would have immunized the British government from claims concerning the detention of property by "any officer of customs *and* excise acting as such." Crown Proceedings Committee, Report, 1927, Cmd. 2842, § 11(5)(c), at 17-18 (U.K.) (emphasis added); see p. 34, *infra*. At the time (and until 2005), in the United Kingdom, a single Customs and Excise Department had responsibility for collecting both customs duties and excise taxes, whereas the Inland Revenue Department had responsibility for collecting income tax. See H.M. Revenue & Customs, *About Us* (visited Sept. 24, 2007) <www.hmrc.gov.uk/menus/aboutmenu.htm>. In the United States, by contrast, internal revenue officers have long had responsibility not only for excise taxes, but also for various other federal taxes (including income tax). See 26 U.S.C. 7608 (2000 & Supp. IV 2004).

sense; doing so would prevent Congress from giving effect to expansive words in a list whenever they are combined with one word with a more restricted meaning"). The only case cited by petitioner in which this Court applied the *ejusdem generis* canon is readily distinguishable on that basis. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 382-385 (2003) (construing 42 U.S.C. 407(a), which precluded recovery of benefits through "execution, levy, attachment, garnishment, or other legal process").

Finally, even assuming it were otherwise applicable, the *ejusdem generis* canon would still not support petitioner's proffered construction of "any other law enforcement officer." That is because petitioner's construction is too narrow. See *James*, 127 S. Ct. at 1592 (rejecting proposed common attribute of items in a list in favor of a "mo[re] relevant" one). All else being equal, if a statute were to refer to "spoons, forks, and any other utensil," it would be unnatural for the phrase "any other utensil" to be read to refer only to all other utensils used in the capacity of spoons or forks, rather than all other kitchen utensils (such as knives). To the extent that the specific phrases are distinct yet share a relevant common attribute, it is simply that customs and excise officers are *law enforcement officers*—a common attribute that merely serves to confirm the plain meaning of the residual phrase "any other law enforcement officer."

b. Petitioner next invokes (Br. 15-17) the related (but discrete) canon of *noscitur a sociis* (or "it is known by its companions"), which stands for the proposition that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding

it." *Black's Law Dictionary* 1084 (7th ed. 1999). That canon, however, is applicable only where the relevant statutory term or phrase is ambiguous. See, *e.g.*, *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 520 (1923) (noting that "*[n]oscitur a sociis* is a well-established and useful rule of construction, where words are of obscure or doubtful meaning, and *then, but only then*, its aid may be sought to remove the obscurity or doubt by reference to the associated words") (emphasis added); *James*, 127 S. Ct. at 1605 (Scalia, J., dissenting) (explaining, in defining the *noscitur a sociis* canon, that "which of various possible meanings a word should be given must be determined in a manner that makes it 'fit' with the words with which it is closely associated"); see also 2A Singer § 47:15, at 265. To take petitioner's example (Br. 16), because the word "bay" has two well-established meanings, it would plainly mean one thing in the sentence, "I took the boat out on the bay," and quite another in the sentence, "I put the saddle on the bay."

Because the phrase "any other law enforcement officer" is broad but not ambiguous, the *noscitur a sociis* canon has no application. Cf. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (noting that, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity[;] [i]t demonstrates breadth") (internal quotation marks and citation omitted); accord *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (characterizing statutory reference in forfeiture statute to "any property" as "comprehensive," "broad," and "unambiguous"). Petitioner's effort to use the *noscitur a sociis* canon dramatically to narrow the scope of the statute simply cannot be squared with the expansive term "any." See pp. 9-10, *supra*. Petitioner seeks to use the canon here to

invert the phrase "any other law enforcement officer" to mean almost *no* other law enforcement officer. But that is a weight that the canon cannot bear.

Even assuming, moreover, that the phrase "any other law enforcement officer" were ambiguous—a contention that petitioner conspicuously fails to make—the *noscitur a sociis* canon would have little, if any, force, because there is only a weak contextual basis to justify limiting the phrase in the drastic manner petitioner proposes: *i.e.*, to law enforcement officers "acting in a customs or tax capacity." Petitioner relies (Br. 17) not only on the preceding phrase "any other officer of customs or excise" in the second part of Section 2680(c), but also on the first part of Section 2680(c), which preserves the government's immunity for the discrete category of claims concerning "the assessment or collection of any tax or customs duty." Putting aside petitioner's reliance on related text that is no more implicated in this case than the exception to the exception that petitioner dismisses as irrelevant, the mere fact that the preceding portion of the statute "dwell[s] exclusively on customs and taxes," *ibid.* (citation omitted), is insufficient to justify imposing an otherwise unnatural limitation on the phrase "any other law enforcement officer" in the distinct detention-of-property portion of the statute. Indeed, the contrast between the two reinforces the conclusion that Congress meant what it said when, in facially expansive language, it made the detention-of-property exception applicable not only to "any officer of customs or excise," but also to "any other law enforcement officer."

This case thus is a far cry from the cases on which petitioner relies, in which the contextual cues were considerably stronger (and the text being interpreted was more ambiguous). For instance, in *Gutierrez* v. *Ada*, 528

U.S. 250 (2000), the Court construed the phrase "any election" in the Guam Organic Act, 48 U.S.C. 1422, to refer only to gubernatorial elections, but it did so based on the fact that the relevant phrase was "preceded by two references to gubernatorial election and followed by four." 528 U.S. at 254-255. Understandably, on that basis, the Court unanimously agreed that such a reading of the phrase "any election" was "obvious." *Id.* at 257. It would constitute a muscular (and indeed, virtually unprecedented) application of the *noscitur a sociis* canon to read a limitation into plain language in one portion of a statute based not on such strong contextual cues, but rather solely on the generic assertion that another portion of the statute focuses on a particular subject.[9]

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[9] In the wake of Congress's enactment of the FTCA, numerous States passed tort-claims statutes of their own. Many of those statutes included provisions strikingly similar to Section 2680(c), but for the understandable omission of any reference to customs officers or duties. It is clear that, under those provisions, the phrase "any law enforcement officer" refers to all law enforcement officers—not simply to law enforcement officers "acting in a tax context." See, *e.g.*, Ga. Code Ann. § 50-21-24(3) (2006) (exception for any claim resulting from "[t]he assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer"); Haw. Rev. Stat. Ann. § 662-15(2) (Supp. 2006) (exception for "[a]ny claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers"); Iowa Code § 669.14(2) (Supp. 2007) (exception for "[a]ny claim arising in respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer"); Mass. Ann. Laws ch. 258, § 10(d) (LexisNexis 2004) (exception for "any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer"); Neb. Rev. Stat. Ann. § 13-910(5) (LexisNexis Supp. 2006) (exception for "[a]ny claim arising with respect to the assessment or collection of any

c. Petitioner also contends (Br. 17-18) that a construction of the detention-of-property exception to reach all law enforcement officers would violate the rule against superfluities, which provides that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Such a construction, however, would not render the phrase "any officer of customs or excise" superfluous. Customs or excise officers would be covered by that phrase, not the successive (and mutually exclusive) phrase "any other law enforcement officer"—just as they would under petitioner's construction.

In fact, it is *petitioner's* construction of Section 2680(c) that would seemingly render the phrase "*any other law enforcement officer*" entirely, or almost entirely, superfluous. While petitioner contends that the phrase should be limited to law enforcement officers (other than customs or excise officers) who are "acting in a customs or tax capacity," it is far from clear when such law enforcement officers would fall into that category, if at all. The only actual example petitioner cites from the sixty-year history of the FTCA is a case in which agents of the Drug Enforcement Administration (DEA) seized and searched an automobile that had been shipped from abroad (and was apparently in domestic transit). See Br. 18 & n.12 (citing *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822 (2d Cir. 1985)). In that case, however, it is doubtful that the DEA agents could be said to have been "acting in a customs or tax capacity"; instead, when the agents seized the automo-

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tax or fee or the detention of any goods or merchandise by any law enforcement officer").

bile (pursuant to a search warrant) and searched it for narcotics, they were presumably acting in their ordinary drug-enforcement capacity. See, *e.g.*, 21 U.S.C. 878 (establishing authority of DEA agents, including authority to execute search warrants); 21 U.S.C. 881(a)(4) and (b) (providing for seizure and forfeiture of "[a]ll * * * vehicles * * * which are used, or are intended for use, to transport" controlled substances); cf. *Formula One Motors*, 777 F.2d at 824 (stating, without elaboration, that the DEA agents were carrying out functions "*akin to* the functions carried out by Customs officials") (emphasis added).[10] Petitioner provides no other examples—either real or hypothetical—of cases that his cramped interpretation of the phrase "any other law enforcement officer" would reach.

In a related vein, petitioner contends (Br. 18) that, "[i]f Congress had actually intended th[e] phrase ['any other law enforcement officer'] to include any law enforcement officer regardless of capacity, the provision

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[10] Similarly, when customs officers enforce the drug laws, they could be said to be acting in a drug-enforcement, not a customs, capacity. See 19 U.S.C. 482 (Supp. V 2005); 21 U.S.C. 952; *Taylor* v. *United States*, 550 F.2d 983, 988 (4th Cir. 1977) (stating that, when a customs officer seized drugs at the border, he was "acting to enforce the drug law's prohibition against importation, not to enforce an independent rule of the customs law"). If so, it is unclear whether detentions of property by such officers would be covered under petitioner's reading of Section 2680(c)—even though Section 2680(c) expressly refers to the detention of goods by "any officer of customs," without any limitation on the capacity in which such an officer is acting. Detentions of property by such officers would unquestionably be covered, by contrast, under the government's reading.

could have simply read 'detention * * * by any law enforcement officer' and meant precisely the same thing." But the fact that Congress might have addressed a topic more concisely does not license rewriting of the statute. Petitioner's contention, moreover, ignores the common practice in legislative (or other) drafting of including specific illustrations in a provision for clarity or emphasis.

Indeed, as this Court has noted, whenever Congress drafts a statute with one or more specific items followed by a general residual phrase, it could omit the specific items and include only a broader version of the general phrase. See *Harrison*, 446 U.S. at 589 n.6.[11] Thus, if Congress passed a statute that referred to "spoons, forks, or any other utensil," it could instead have referred simply to "any utensil." The same could be said, moreover, even if the residual phrase at issue is written in general terms but narrowed through the canon of *ejusdem generis*. Thus, if Congress passed a statute that referred to "spoons, forks, or any other utensil" and the statute were construed to refer to "spoons, forks, or any other kitchen utensil," Congress could instead have referred simply to "any kitchen utensil."

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[11] The United States Code—and indeed the Constitution—are replete with similar provisions. See, *e.g.*, U.S. Const. Art. IV, § 2, Cl. 2 (providing for extradition of persons "charged in any State with Treason, Felony, or other Crime"); 18 U.S.C. 758 (imposing criminal sanctions for "flee[ing] or evad[ing] a checkpoint operated by the Immigration and Naturalization Service, or any other Federal law enforcement agency"); 18 U.S.C. 2113(a) (imposing criminal sanctions for taking from a bank "any property or money or any other thing of value"); 20 U.S.C. 1652(b) (prohibiting any "officer, agent, or employee of the Department of Education, the Department of Justice, or any other Federal agency" from requiring local education agencies to use funds for busing).

Applying that logic to this case, even under petitioner's construction of the detention-of-property exception, Congress could readily have rewritten the statute to say the same thing: rather than referring to "any officer of customs or excise or any other law enforcement officer [acting in a customs or tax capacity]," Congress could instead have referred simply to "any law enforcement officer acting in a customs or tax capacity."

Moreover, while Congress could have given Section 2680(c) the same meaning simply by referring to "any law enforcement officer," its decision not to do so, and instead to break out the specific reference to "any officer of customs or excise," is readily understandable in light of the provision's history. As discussed below, see p. 31, Section 2680(c), as initially drafted, consisted only of the portion preserving the government's immunity for claims concerning "the assessment or collection of any tax or customs duty." The detention-of-property portion was subsequently proposed to be added to that provision, almost certainly by Special Assistant to the Attorney General Alexander Holtzoff, and eventually enacted without alteration (or discussion). Although Judge Holtzoff's exact thought processes in drafting the detention-of-property exception remain unknown, he may have broken out the phrase "any officer of customs or excise" from the phrase "any other law enforcement officer" to emphasize that customs or excise officers would be covered (or to eliminate any doubt on that score). See, *e.g.*, *Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641, 646 (1990); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983); *Circuit City Stores*, 532 U.S. at 140 (Souter, J., dissenting). Alternatively, Judge Holtzoff may have initially drafted the detention-of-property exception to reach only customs or excise officers (thus

picking up, if somewhat imprecisely, on the general subject of the prior portion of the provision, as well as the language of the British bill on which the exception was based), then extended the exception to reach other law enforcement officers on the ground that the justifications for exempting claims concerning the detention of property by customs or excise officers apply to the detention of property by other law enforcement officers as well. See pp. 31-34, *infra*; cf. CAFRA § 3(a)(1), 114 Stat. 211 (extending exception from the detention of "any goods or merchandise" to the detention of "any goods, merchandise, or other property"). But regardless whether Congress's ultimate use of the specific phrase "any officer of customs or excise" can be traced to a desire for emphasis, an abundance of caution, or merely the evolution of the statute, there is ample explanation for its inclusion—and the mere *fact* of its inclusion certainly does not counsel in favor of a more limited reading of the phrase "any other law enforcement officer."

Finally, petitioner contends (Br. 23) that the rule against superfluities requires that the definition of "law enforcement officer" in Section 2680(h), the FTCA's intentional-tort exception, not be applied to Section 2680(c)—and goes so far as to suggest (Br. 23 n.18) that the fact that Congress defined that phrase in Section 2680(h) affirmatively suggests that Congress intended a narrower meaning for "law enforcement officer" in Section 2680(c). No such inference can be drawn, however, from Section 2680(h). That subsection defines a slightly different phrase—"investigative or law enforcement officers"—and expressly does so only for purposes of that subsection (which waives the government's immunity for claims arising out of intentional torts that involve the acts or omissions of "investigative or law

enforcement officers"). Moreover, the purpose of the definition of that phrase in Section 2680(h) may well have been to impose *limits* on how broadly the phrase (and the resulting waiver of sovereign immunity) would be interpreted—especially given its reference to "investigative" officers—not (as petitioner seemingly assumes, see Br. 22 n.16) to ensure that the phrase would be interpreted more *expansively* than its plain language would otherwise require.[12] To the extent that Section 2680(h) is relevant, therefore, it is because its definition is consistent with the plain meaning of the phrase "law enforcement officer." See pp. 14-15, *supra* (discussing definitions from Section 2680(h) and other statutes). Because petitioner offers no valid textual basis for deviating from that plain meaning, the Court should adopt it here.[13]

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[12] As petitioner also notes (Br. 24), the portion of Section 2680(h) containing that definition was added in 1974—after the original enactment of the FTCA. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.

[13] Petitioner also relies (Br. 47-48 n.42) on Congress's failure to pass the Forfeiture Act of 1997 (a predecessor to CAFRA), which not only would have created an exception to Section 2680(c)'s exception for civil forfeiture (like CAFRA), but also would have incorporated the definition of "investigative or law enforcement officer" from Section 2680(h) into Section 2680(c). H.R. 1745, 105th Cong., 1st Sess. § 106 (1997). Petitioner's preference for interpreting the scope of Section 2680(c) based on a failed predecessor to CAFRA, while seeking to ignore the strong cues provided by CAFRA's duly enacted text, inverts this Court's usual approach. The Court has repeatedly warned that "[c]ongressional inaction lacks persuasive significance," on the ground that "several equally tenable inferences may be drawn from such inaction." *E.g.*, *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). There are particularly good reasons not to attach any significance to Congress's inaction with regard to the Forfeiture Act. Congress may simply have been dissatisfied with other

C. The Legislative History Of Section 2680(c) Likewise Does Not Support The Conclusion That The Phrase "Any Other Law Enforcement Officer" Refers Only To Law Enforcement Officers Who Are "Acting In A Customs Or Tax Capacity"

Petitioner contends (Br. 25) that the legislative history of Section 2680(c) "confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities." As a preliminary matter, there is no need to resort to legislative history where, as here, the relevant statutory text is unambiguous. See, *e.g.*, *Circuit City Stores*, 532 U.S. at 119; *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994); *Connecticut Nat'l Bank*, 503 U.S. at 254. As this Court has recognized in construing a different aspect of Section 2680(c), moreover, the legislative history of that provision is "meager." *Kosak*,

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provisions of that bill. And to the extent that Congress focused on the provision that would have amended Section 2680(c), Congress may have been uncomfortable with the scope of the bill's exception to the exception for civil forfeitures, which was considerably broader than the one ultimately enacted three years later in CAFRA. Finally, Congress may have thought it unnecessary to provide an express definition of "law enforcement officer" in Section 2680(c), in light of the fact that the clear majority of the circuits to have addressed the issue had held, consistent with the phrase's plain meaning, that it reached *all* law enforcement officers. See p. 11 n.5, *supra*. The mere fact that the Sixth Circuit had held to the contrary hardly suggests that Congress ratified its construction by failing to enact the Forfeiture Act—and the case on which petitioner relies for that proposition is wholly inapposite. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (finding significant "a refusal by Congress to overrule *an agency's* construction of legislation * * * where the *administrative* construction has been brought to Congress's attention through legislation specifically designed to supplant it") (emphases added).

465 U.S. at 855. To the extent the legislative history of Section 2680(c) sheds any light on Congress's intent in using the phrase "any other law enforcement officer," however, it supports the government's construction of that phrase, not petitioner's.

1. As petitioner correctly notes (Br. 25-26), in the twenty years before the FTCA's eventual enactment in 1946, Congress considered various bills that would have waived the government's sovereign immunity for tort claims. Early versions of those bills contained a precursor to Section 2680(c) that preserved the government's immunity for claims concerning "the assessment or collection of any tax or customs duty," but made no provision for claims concerning the detention of property. See, *e.g.*, H.R. 17168, 71st Cong., 3d Sess. § 3(a)(2) (1931); H.R. 15428, 71st Cong., 3d Sess. § 4(a)(2) (1930); S. 4377, 71st Cong., 2d Sess. § 4(a)(2) (1930). The exception for claims concerning "the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" first appeared in bills introduced in December 1931, see H.R. 5065, 72d Cong., 1st Sess. § 206(2); S. 211, 72d Cong., 1st Sess. § 206(2), and reappeared verbatim in various bills leading up to the FTCA's enactment in 1946. The language of the House bill in which the exception first appeared was prepared by the General Accounting Office and the Department of Justice. See *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 7 (1932) (*1932 Hearing*) (statement of Rep. Collins).

2. The language of the detention-of-property exception, like other language in the House bill, was almost certainly initially drafted by Special Assistant to the Attorney General Alexander Holtzoff. See *Kosak*, 465

U.S. at 855-856. In a report accompanying his own draft bill, which contained the detention-of-property exception, Judge Holtzoff provided an explanation for the addition of that language.[14] At the outset, he observed that the exception for claims concerning the assessment or collection of any tax or customs duty "appears in all previous drafts." Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931). He then stated that the provision had been expanded so as to reach claims concerning "the detention of goods or merchandise by any officer of customs or excise"—thus tracking the language in the first part of the detention-of-property exception. *Ibid.* In the critical next sentence of his report, Judge Holtzoff noted that the detention-of-property exception "has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by *law enforcement officials*, internal revenue officers, and the like." *Ibid.* (emphasis added).

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[14] Judge Holtzoff's report was submitted to Assistant Attorney General Charles B. Rugg, who in turn transmitted it to counsel for the Comptroller General in the General Accounting Office. See Letter from Charles B. Rugg to O.R. Maguire (Oct. 19, 1931). In *Kosak*, this Court considered Judge Holtzoff's report on the ground that it would be "senseless to ignore entirely the views of [Section 2680(c)'s] draftsman." 465 U.S. at 857 n.13. At the same time, however, the Court acknowledged that, "because the report was never introduced into the public record, the ideas expressed therein should not be given great weight in determining the intent of the Legislature." *Ibid.* In his dissenting opinion in *Kosak*, Justice Stevens noted that "[t]here is no indication that any Congressman ever heard of [Judge Holtzoff's report] or knew that it even existed," *id.* at 863, and concluded that "[t]he intent of a lobbyist—no matter how public spirited he may have been—should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist's intent," *ibid.*

By referring to "law enforcement officials" without qualification, Judge Holtzoff seemingly expressed the view that all law enforcement officers would be covered by the detention-of-property exception, regardless whether they were "acting in a customs or tax capacity." In contending otherwise, petitioner attempts to apply the same canons of construction to Judge Holtzoff's explanatory language that he wields against the statutory text. See Br. 29 (contending that "[Judge Holtzoff's] reference to 'other [*sic*] law enforcement officers, internal revenue officers, and the like' * * * is best understood as his way of explaining that the exception turned on the acts in which [those individuals] might be engaged—specifically, the detention of property while enforcing customs and tax laws"). When read in context, however, there is even less reason to limit Judge Holtzoff's use of the phrase "law enforcement officials" than Congress's use of the phrase "law enforcement officer" in the FTCA itself. Unsurprisingly, therefore, even one of the courts of appeals that ultimately adopted petitioner's reading of Section 2680(c) abjured any reliance on Judge Holtzoff's report. See *Bazuaye* v. *United States*, 83 F.3d 482, 484 (D.C. Cir. 1996) (explaining that "[a]ny attempt to parse this report suffers from the same interpretative problem plaguing § 2680(c) itself"). At a minimum, the relevant language in Judge Holtzoff's report does not support the proposition that the phrase "any other law enforcement officer" should be limited to law enforcement officers "acting in a customs or tax capacity"; to the contrary, it affirmatively undermines that proposition. See *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1524 (Fed. Cir. 1988) (concluding that "the government's

broad reading of [Section 2680(c)] comports with [Judge Holtzoff's] report").[15]

Petitioner also relies (Br. 29-30) on the next sentence in the report, in which Judge Holtzoff explained that the inspiration for the detention-of-property exception was "[a] proposed draft of the bill submitted by the Crown Proceedings Committee in England in 1927." That sentence, however, sheds no light on the meaning of the residual phrase "any other law enforcement officer," because the British bill, unlike Judge Holtzoff's draft bill, did not contain such a residual phrase. See Crown Proceedings Committee, Report, 1927, Cmd. 2842, § 11(5)(c), at 17-18 (U.K.) (immunizing the British government from claims concerning the detention of property by "any officer of customs and excise acting as such"). Judge Holtzoff apparently added the phrase "any other law enforcement officer" himself—and it is reasonable to conclude that he did so in the belief that the justifications for exempting claims concerning the detention of property by customs or excise officers (as the British bill did) applied equally to the detention of property by other law enforcement officers. See pp. 37-45, *infra*.

3. Petitioner also cites (Br. 31-32) various other items from the legislative history of unenacted tort-

[15] Notably, elsewhere in his report, Judge Holtzoff noted that the New York Attorney General had informed him that, under that State's tort statute, "claims for damages by prison inmates ha[d] been on the increase." *Holtzoff Report* 14. Judge Holtzoff then explained that "[t]his source of liability [was] expressly eliminated by the proposed [federal] bill." *Ibid.* Insofar as prisoner claims for property damage are concerned, the basis for preserving the federal government's immunity against such claims would presumably be the detention-of-property exception that Judge Holtzoff apparently added to Section 2680(c).

claims bills containing the detention-of-property exception. As this Court has noted, however, the provision that would become Section 2680(c), like many of the other proposed statutory exceptions, was never the subject of congressional debate, and there is therefore no "direct evidence regarding how Members of Congress understood" that provision. *Kosak*, 465 U.S. at 857 n.13.

The only authorities cited by petitioner (Br. 31 n.26) that so much as mention the provision that would become Section 2680(c) are committee reports and other materials that summarize—often in a single sentence—*all* of the proposed exceptions. It is true that, in describing the provision that would become Section 2680(c), those summaries do not advert to the phrase "any other law enforcement officer"—and, indeed, sometimes do not mention the detention-of-property exception (or various other exceptions) at all. See, *e.g.*, S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942) (referring to "claims arising out of * * * the assessment or collection of taxes or assessments [or] the detention of goods by customs officers");[16] H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5 (1940) (referring only to "claims arising in connection with * * * the collection of taxes"). As petitioner seemingly acknowledges (Br. 31), however, those summaries provide no affirmative support for the proposition that Congress intended the phrase "any other law enforcement officer" to include only law enforcement officers "acting in a customs or tax capacity."

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[16] The summary in the 1942 Senate report was repeated verbatim in a series of subsequent reports. See H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1946); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946); Staff of the Joint Comm. on the Organization of Congress, 79th Cong., 2d Sess., *Legislative Reorganization Act of 1946*, at 38 (Comm. Print 1946).

To the extent those summaries even refer to the detention-of-property exception, they at most suggest that Congress was particularly concerned with claims concerning the detention of property by customs officers—not that Congress did not intend to reach claims concerning the detention of property by all other law enforcement officers. Cf. *Kosak*, 465 U.S. at 865 (Stevens, J., dissenting) (explaining that, in those summaries, "precision of meaning [was] naturally and knowingly sacrificed in the interest of brevity"). As this Court has noted, "mere silence in the legislative history" cannot overcome "the clarity of the text." *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005); see *Harrison*, 446 U.S. at 592 (noting that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute").

Petitioner also notes (Br. 31-32) that, in testifying before Congress about the provision that would become Section 2680(c), Assistant Attorney General Francis M. Shea characterized that provision as applying to "claims arising out of * * * the assessment or collection of taxes or duties * * * [and] the detention of goods by customs officers." *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942). Like the congressional summaries discussed above, however, Assistant Attorney General Shea's summary is silent about, and carries no negative implication regarding, the meaning of the phrase "any other law enforcement officer." Indeed, an explanatory memorandum concerning the then-pending version of the bill (which was apparently supplied by Assistant Attorney General Shea at the same hearing, see *id.* at 7) contained a more detailed

summary making clear that the provision reached "claims arising out of * * * the assessment or collection of taxes or customs [and] the detention of goods by a customs, excise, *or law-enforcement officer*." *Id.* at 45 (emphasis added). There is therefore no reason to believe that anyone in the Department of Justice—much less any Member of Congress—thought that the phrase "any other law enforcement officer," contrary to its plain meaning, included only law enforcement officers "acting in a customs or tax capacity."

D. Treating Bureau Of Prisons Officials As "Law Enforcement Officers" For Purposes Of The Detention-Of-Property Exception Is Consistent With The Purposes Of The FTCA's Exceptions More Generally

Petitioner also contends (Br. 33) that the purposes behind the FTCA's exceptions "confirm[] that Congress intended the [detention-of-property] exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities." Petitioner's reliance on the purposes behind the FTCA's exceptions, like his reliance on the legislative history of Section 2680(c), is unavailing. A reading of the detention-of-property exception that reaches all law enforcement officers not only is consistent with the plain language of Section 2680(c), but also furthers Congress's underlying policy objectives.

1. In *Kosak* v. *United States*, *supra*, this Court held that, by exempting "claim[s] arising in respect of * * * the detention of any goods or merchandise by any officer of customs," Section 2680(c) reached not only claims for damage caused by the act of detention itself, but also claims resulting from the negligent handling or storage of detained property. 465 U.S. at 854. In so holding, the

Court explained that "our interpretation of the plain language of [Section 2680(c)] accords with what we know of Congress' general purposes in creating exceptions to the Tort Claims Act." *Id.* at 858. The Court added that it was considering those purposes "merely to ensure that our construction is not undercut by any indication that Congress meant the exception [in Section 2680(c)] to be read more narrowly." *Id.* at 858 n.16. The Court then noted that "[t]he three objectives most often mentioned in the legislative history as rationales for the enumerated exceptions" were "ensuring that 'certain governmental activities' not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the [FTCA] to suits for which adequate remedies were already available." *Id.* at 858.

2. Petitioner appears to concede (Br. 35 n.30) that an FTCA exception need only be supported by one of those three congressional purposes. In fact, like the Court's reading of Section 2680(c) in *Kosak*, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers is consistent with all three. First, such a reading ensures that important governmental activities are not disrupted by the threat of damages suits. The most common type of claim that petitioner's construction of Section 2680(c) would permit are claims (such as petitioner's) by prisoners challenging the loss of, or damage to, their personal property, typically during an inter- or intra-prison transfer. See, *e.g.*, *ABC* v. *DEF*, No. 06-1362, 2007 WL 2500738, at *1 (2d Cir. Sept. 5, 2007); *Bramwell* v. *United States Bureau of Prisons*, 348 F.3d 804, 805-806 (9th Cir. 2003), cert. denied, 543 U.S. 811 (2004); *Chapa*, 339 F.3d at 389. The Bureau of Prisons, of course, rou-

tinely conducts such transfers, and Congress could reasonably have concluded that the threat of liability from (and litigation over) loss of, or injury to, personal property would serve as a deterrent to such transfers even when they would serve important penal objectives.

While claims by prisoners are the most common type of claim that petitioner's construction would affect, that construction would also open the way for claims based on the detention of property by law enforcement officers in a variety of other contexts. See, *e.g.*, *Bazuaye*, 83 F.3d at 483 (postal inspectors); *Kurinsky* v. *United States*, 33 F.3d 594, 595 (6th Cir. 1994) (Federal Bureau of Investigation agents), cert. denied, 514 U.S. 1082 (1995); *Cheney* v. *United States*, 972 F.2d 247, 248 (8th Cir. 1992) (per curiam) (drug task force agents); *Ysasi*, 856 F.2d at 1522 (Border Patrol agents); *United States* v. *2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1484 (10th Cir.), cert. denied, 469 U.S. 825 (1984) (Department of Agriculture inspectors); *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 392-393 (9th Cir. 1979) (Federal Aviation Administration officials). This Court's reasoning in *Kosak* with regard to claims against customs officers is equally valid with regard to those claims. As the Court explained, the power to detain property not only is a vital investigative tool, but is "[o]ne of the most important sanctions available * * * in ensuring compliance with the * * * laws." 465 U.S. at 859. In enacting Section 2680(c), "Congress may well have wished not to dampen the enforcement efforts of the [government] by exposing [it] to private damages suits by disgruntled owners of detained property." *Ibid.*

Second, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers avoids exposing the govern-

ment to liability for fraudulent claims. Although law enforcement agencies typically take inventories of detained property, those inventories do not always contain exhaustive details concerning the condition and other particulars of the property. See, *e.g.*, BOP, U.S. Dep't of Justice, *Program Statement No. 5800-12, Receiving and Discharge Manual*, 4-12 to 4-14 (1998) <www.bop.gov/policy/progstat/5800012.pdf> (discussing form used for inventories of prisoners' personal property). As a result, the Government will often "be in a poor position to defend a suit in which the owner [of property] alleged that [an] item was returned in damaged condition." *Kosak*, 465 U.S. at 859. And the concern that the government will be exposed to fraudulent or frivolous claims is particularly acute in the prison context, as both this Court and Congress have recognized. See, *e.g.*, *Jones* v. *Bock*, 127 S. Ct. 910, 914 (2007); Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e *et seq.* The BOP reports that, in the last three years alone, it has received more than 12,000 administrative tort claims from prisoners for lost or damaged property. With regard to suits concerning the detention of property by BOP officials (and by other law enforcement officers), "Congress may have reasoned that the frequency with which the Government would be obliged to pay undeserving claimants if it waived immunity from such suits offset the inequity, resulting from retention of immunity, to persons with legitimate grievances." *Kosak*, 465 U.S. at 859-860.

Third, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers excludes coverage for suits for which adequate remedies were at least arguably already available. At common law, other law enforcement offi-

cers, no less than customs officers, could potentially be held liable for damages to detained property on a theory of negligence. See, *e.g.*, Restatement of Torts (Second) § 265 illus. 1-2, at 500-501 (1965) (cattle inspectors and officers of the peace); Joseph Story, *Commentaries on the Law of Bailments* § 620, at 626 (8th ed. 1870) (officers of the courts); cf. *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 404-405 (1899) (suit against marshal based on improper seizure of property); *Jones* v. *Simpson*, 116 U.S. 609, 610 (1886) (same).[17] Although it is true that, at the time of the FTCA's enactment, customs officers and internal revenue officers (unlike some other law enforcement officers) could remove claims against them to federal court, see Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198,[18] and "collectors" and "other officers of the revenue" could obtain indemnification from the government under certain circumstances, see Act

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[17] In addition, since before the enactment of the FTCA, federal agencies (including law enforcement agencies) have had the authority to settle administrative claims for not more than $1000 resulting from damage to, or loss of, property caused by an employee's negligence. See 31 U.S.C. 3723. Regardless of the outcome of this case, that statute would give the BOP the authority to settle most, if not all, of the claims for lost or damaged property brought by federal prisoners. The BOP reports that, notwithstanding the government's position on the availability of an FTCA claim, the BOP routinely settles administrative claims for lost or damaged property; in fact, in the last three years alone, the BOP has settled more than 1,100 such claims.

[18] In 1948, two years after the enactment of the FTCA, Congress expanded the preexisting removal statutes to allow removal by any federal officer sued for an act under color of his office. See 28 U.S.C. 1442(a).

of Mar. 3, 1863, ch. 76, § 12, 12 Stat. 741,[19] Congress may well have concluded that the availability of a common-law remedy against law enforcement officers in their individual capacities was sufficient.[20]

3. Perhaps in recognition of the fact that the government's reading of Section 2680(c) would unquestionably be consistent with the first two purposes of the FTCA's exceptions, petitioner contends that, in *Kosak*, this Court suggested that "Congress' '*only* arguably relevant' purpose for enacting *§ 2680(c)*" was to avoid duplication of remedies. Br. 35 (quoting *Kosak*, 465 U.S. at 859 n.17); see Br. 38. *Kosak* itself, however, belies that contention. In *Kosak*, the Court expressly concluded that its reading of Section 2680(c) was "certainly consistent" with the first two purposes of the FTCA's exceptions (protecting important government functions and curtailing liability for fraudulent claims), 465 U.S. at 859, and "[t]o a lesser extent * * * consistent" with the

[19] It is far from clear whether the federal indemnification statute (now codified, as amended, at 28 U.S.C. 2006 (Supp. IV 2004)), which refers only to "collector[s]" and "other revenue officer[s]," would provide indemnification against property claims for all of the officers covered by petitioner's reading of Section 2680(c): *i.e.*, not only any officer of customs or excise, but also any other law enforcement officer "acting in a customs or tax capacity."

[20] In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which allows the federal government to substitute itself as the defendant in a tort action against a federal employee (and to remove such an action from state court to federal court) upon certification by the Attorney General that the employee was acting within the scope of his duties. 28 U.S.C. 2679(d). The government may then seek to dismiss any tort claim (including common-law claims brought against customs officers or other law enforcement officers) for which its immunity is not waived under the FTCA. See *United States* v. *Smith*, 499 U.S. 160, 161-162 (1991).

third (avoiding duplication of remedies), *id.* at 860. And far from suggesting that Congress's "only arguably relevant" purpose in enacting Section 2680(c) was avoiding the duplication of remedies, the Court merely noted that "the only arguably relevant *specific statement* as to the purpose of § 2680(c)" in the legislative history was a statement made by Judge Holtzoff in testimony before Congress, *id.* at 859 n.17 (emphasis added)—a statement that the Court correctly proceeded to discount, on the ground that it pertained to "the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes" and not "the portion of the provision pertaining to the detention of goods," *ibid.* (citing *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940)).[21]

Petitioner also contends (Br. 36) that other legislative history of Section 2680(c) "supports the Court's * * * suggestion that Congress enacted § 2680(c) with only the third general purpose * * * in mind." Like Judge Holtzoff's testimony, however, that legislative history suggests only that Congress enacted the *first* portion of Section 2680(c), which exempts claims concerning "the assessment or collection of any tax or customs duty," for the purpose of avoiding duplicative remedies: *i.e.*, because an aggrieved person could bring a

[21] The other cases cited by petitioner (Br. 36) do not support the proposition that Section 2680(c) was solely intended to avoid duplicative remedies. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 427 n.5 (1995) (quoting only the first portion of Section 2680(c)); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam) (stating that "[t]he purpose [of Section 2680(c)] was to avoid duplication," but citing only Judge Holtzoff's testimony).

refund action for any tax or customs duty that he believed he did not owe. The various committee reports petitioner cites are readily distinguishable on the ground that they concern pre-1931 versions of the bill, which contained only the first portion of what is now Section 2680(c), and did not contain a detention-of-property exception. See Br. 37. The only other authority petitioner cites is a statement by O.R. McGuire, counsel to the Comptroller General, who testified merely that claims concerning "the assessment or collection of any tax or customs duty" are "taken care of under the taxation or customs laws * * * to a large extent." *1932 Hearing* 18. There is no evidence in the legislative history to suggest that Congress's sole purpose in adopting the detention-of-property clause was to avoid duplication of remedies—much less that a broader construction of that clause would fail sufficiently to serve that purpose.

4. Finally, petitioner notes (Br. 33) that, by including a broad waiver of the government's sovereign immunity in the FTCA, Congress intended to relieve itself of the burden of having to pass private bills in order to afford relief to tort claimants. Notably, however, petitioner cites no evidence that Congress was particularly burdened with requests for private bills from individuals with claims concerning the detention of property by "other" law enforcement officers.[22] Nor, for that matter, does petitioner contend that Congress has been burdened with similar requests in the sixty years since the

[22] Although this Court has noted that a number of private bills had been passed on behalf of federal prisoners at the time of the FTCA's enactment, see *United States* v. *Muniz*, 374 U.S. 150, 154 & n.7 (1963), all of the bills cited by the Court involved claims for personal injury, rather than claims for property damage.

enactment of the FTCA, despite the fact that courts in much of the country have construed the FTCA to preclude relief on such claims. As with claims covered by the FTCA's other exceptions, Congress retains the power to pass private bills in the event that it concludes that such claims are meritorious. More pertinently, should Congress wish categorically to subject the United States to liability for claims concerning the detention of property by law enforcement officers who are not "acting in a customs or tax capacity," it can always amend Section 2680(c) to add petitioner's proposed limitation. That limitation, however, cannot be derived from the text of the current statute, as the court of appeals correctly held.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in relevant part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * * *

2. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

3. 28 U.S.C. 2672 provides:

Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

4. 28 U.S.C. 2673 provides:

Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

5. 28 U.S.C. 2674 provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

6. 28 U.S.C. 2675 provides:

Disposition by federal agency as pre-requisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

7. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

8. 28 U.S.C. 2677 provides:

Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

9. 28 U.S.C. 2678 provides:

Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

10. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such ac-

tion or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be

subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

11. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by sections 741-750, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

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[1] So in original.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.